

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE
ACT, R.S.O. 1990, c. C.43, AS AMENDED

AIDE MEMOIRE

(14 June 2023 Attendance)

1. The Authority is seeking an Order on 14 June 2023 that requires that PBDF produce Messrs Mills and Pearce to be examined prior to 30 June 2023 and that they respond to undertakings and refusals prior to 7 July 2023. The Authority is prepared, should Your Honour direct to produce Mr. Rienas and produce Mr. Clutterbuck or Ms Costa to be re-examined based on the responses given to their undertakings and refusals.

2. The following relief being sought by PBDF on its Cross-Motion will be adjudicated on 25-27 July 2023:

1. *An order staying the Authority's motion seeking to terminate the Lease (defined below) in respect of any alleged default under the Lease until a determination is made with respect how the Lease is impacted by the Border Restrictions, and what amount of Base Rent, if any, Base Rent is payable under the Lease.*
2. *A declaration that the U.S.-Canada border restriction legislation and related regulations and requirements as a result of the Covid-19 pandemic ("Border Restrictions"), individually and collectively, amount to an "unanticipated introduction of or a change in any Applicable Laws" that caused a material Adverse Effect on Duty Free's business operations at the Leased Premises, thereby engaging subsection 18.07 of the Lease.*

3. *A declaration the Authority had and has an ongoing obligation to consult with Duty Free about the impact of the U.S.-Canada Border Restrictions (as they evolved individually and collectively) would and continue to have on the Lease, and to reasonably reconsider the impacted terms of the Lease, including Article IV of the Lease dealing with Base Rent.*
4. *A declaration the Authority breached subsection 18.07 of the Lease by failing to enter into reasonable, or any, discussions with Duty Free about the impact of the Border Restrictions as they evolved, individually and collectively, on Base Rent payable under the Lease to the date of this motion.*
5. *A declaration in respect of whether any Base Rent is due and payable under the Lease, and if so, a determination of the amount owing, specifically with respect to the following periods impacted by introduction and changes in Applicable Laws due to the Covid-19 pandemic:*
 - (a) *The Canada Emergency Commercial Rent Assistance ("CECRA") program period from April to September 2020;*
 - (b) *From October 2020 to November 8th, 2021, the day before the U.S.-Canada border reopened for non-essential travel (with restrictions);*
 - (c) *November 9th, 2021 to September 30th, 2022, when the Canadian government discontinued vaccine requirement for entry and use of the ArriveCAN app;*
 - (d) *October 1st, 2022 to the date to be determined when the U.S. border reopens for unvaccinated travellers.*
6. *In the event that arrears of Base Rent are determined to exist, an order that those arrears are to be amortized over the balance of the term of the Lease.*
- ...
11. *An order directing how Base Rent payable will be calculated in the event of a future pandemic and subsequent Border Restrictions.*

3. On 4 April 2023, Your Honour directed that the parties provide limited disclosure by 5 May 2023:

17. *The Tenant requested an order for discovery-like production to be made by both sides. Given that this is a contract interpretation case in which context/factual matrix has some limited relevance but must be considered on an objective standard, the court has provided the following directions regarding limited-scope production to be made by the Landlord and the Tenant by May 5, 2023 (in advance of any examinations):*
 - a. *Documents exchanged between the parties and between their respective counsel, unless exchanged on a without prejudice/settlement basis (to be produced to each other to the extent not already appended as exhibits to affidavits already filed on the Cross-Motion):*
 - i. *In the time frame in which the Lease was being negotiated (circa 2016) that relate to s. 18.07 of the Lease or its subject matter; and*

- ii. *In the time frame in which the boarder restrictions came into effect and thereafter (March 2020-December 2021) with respect to the effect and implementation of s. 18.07 of the Lease.*
- b. *Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:*
 - i. *Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and*
 - ii. *Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).*

18. *The court has not at this time made any ruling as to the admissibility or relevance of such documents, only that they shall be produced and available to be questioned upon. Redactions may be made on the face of any such produced documents for privilege.*

4. On 4 April 2023, Your Honour also directed that any Rule 39.03 examinations be completed by 26 May 2023, cross-examinations be completed by 7 June 2023 and undertakings be answered by 30 June 2023.

5. On 4 May 2023, the Authority delivered its disclosure. A copy of the transmittal letter is attached.

6. On 5, May 2023, PBDF delivered its disclosures. After receiving PBDF's disclosures, the Authority determine that no Rule 39.03 examinations would be necessary.

7. PBDF determined that it would examine Karen Costa, the Authority's CFO, and Tim Clutterbuck, a Director and sometime Chair of the Authority's Board. PBDF specifically requested to examine Mr. Clutterbuck.

8. On 30 May 2023, PDBF conducted Rule 39.03 examinations of Ms. Costa and Mr. Clutterbuck. Ms. Costa and Mr. Clutterbuck provided responses to their undertakings and refusals on 7 June 2023.

9. Immediately after examining Ms Costa and Mr. Clutterbuck, PBDF cancelled the cross examination of Ron Rienas that was scheduled for 6 June 2023 and refused to produce Ben Mills and Jim Pearce for cross-examination on 5 June 2023 and 7 June 2023 respectively. PBDF did this based on the assertion that the Authority's disclosures were not complete and no cross-examinations could take place until additional disclosures were provided and the Authority had the opportunity to re-examine Ms. Costa and Mr. Clutterbuck.

10. PBDF has raised a number of issues with the Authority's disclosures and the parties have exchanged letters setting out their positions. The letters exchanged by the parties with respect to these issues are attached.

11. There is no dispute that the Authority did not provide the detailed index that PBDF requested until 25 May 2023. PBDF did not, however, raise any issues at all with the Authority's disclosures until 16 May 2023 and did not request a detailed index until 19 May 2023. PBDF had

the detailed index and all disclosures, except for the documents over which the Authority asserts privilege when it examined Ms Costa and Mr. Clutterbuck.

12. There are, from the Authority's perspective, three (3) main to be determined with respect to its disclosure: (a) is the Authority required to produce un-redacted copies of certain Reports; (b) is the Authority required to produce Reports over which privilege is claimed; and (c) are the parties required to provide a list of all documents over which privilege is claimed. The Authority initially refused to disclose Minutes from Meetings on 20 November 2021 and 17 December 2021 on the basis that they were privileged, but those Minutes were provided in response to undertakings given by Mr. Clutterbuck.

Redacted Reports

13. The Authority has redacted three (3) Reports—554/16 (26 February 2016), 573/16 (23 June 2016) and 869/20 (24 April 2020).

14. The redaction from Report 554/16 relates to legal advice provided by Gowling in connection with issues raised by PBDF with respect to whether the Authority had the legal right to issue an RFP. There is no reference to Art 18.07 in the redacted portion.

15. The redactions from Report 573/16 relate to the identity of the other parties that responded to the RFP and the economic analysis of the various responses. The report from the RFP Solutions is also not disclosed. There is no reference in the redacted portions of the Report or the RFP Solutions report to Art 18.07.

16. The redactions from Report 869/20 relate to the US duty free operator and the rent deferral agreement reached with the US duty free operator. There is no reference to Art 18.07 in the redacted portions of the Report.

Privileged Reports

17. The Authority claims solicitor-client and/or litigation privilege over the entirety of three (3) Reports prepared for the Board—933/21 (30 April 2021), 938/21 (28 May 2021) and 953/21 (2 September 2021).

18. Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Once there is a document created for "the dominant purpose of litigation" and the litigation in question or related litigation is pending "or may reasonably be apprehended", there is a *prima facie* presumption of inadmissibility such that the document in issue need not be disclosed. [*Lizotte v. Aviva Insurance Company of Canada*, [2016 SCC 52](#) (CanLII), paras 1 and 33]

19. The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. [*Moseley v. Spray Lakes Sawmills (1980) Ltd.*, [1996 ABCA 141](#) (CanLII)]

20. The fact that the Reports were not prepared by the Authority's lawyers and may contain isolated facts that are not on their own privileged does not destroy the Authority's claim of litigation privilege. As noted in *Lytton v. Alberta* [[1999 ABQB 300](#) (CanLII)]

Although there are compiled facts in the Report any one of which, taken alone, would not ground privilege, the combination and choice of those individual facts, like stars forming a constellation, could, if released, reveal patterns and privileged information to those versed in the art of reading the signs and prognosticating litigation strategies. Mr. Harding and his colleagues are competent in this art and would doubtless make excellent use of what was revealed by the Defendant's various choices, combinations, and exclusions of what would otherwise be singularly benign and innocent facts. The facts chosen could reveal the Defendant's underlying method, analysis, approach or strategy and therefore the facts in the Report qualify, in my view, as privileged work-product given the purpose of the Report. The Plaintiffs can be assured that there is no star in the Report which is not already clearly visible to them; they do not need the Defendant to connect the dots for them.

21. The Reports over which the Authority asserts privilege are all marked "Confidential" and were prepared for the purpose, and in reasonable contemplation, of litigation between the Authority and PBDF concerning the Lease. They also refer to or include privileged communications between the Authority and Gowling.

22. By April of 2021, PBDF had defaulted under the Lease and the Authority had engaged litigation counsel in connection with its remedies against PBDF. The very litigation that was contemplated in 2021—litigation over whether PBDF (or the Authority) has breached the Lease—is now pending before Your Honour

23. Report 933/21 was prepared for the purpose of providing legal advice and factual information to the Board so that the Board could provide instructions to Gowling as to how to proceed in dealing with the defaults by PBDF. It attaches: (a) an e-mail exchange with Gowling in which legal advice is provided; (b) PBDF's 2020 audited financials; and (c) correspondence exchange between the Authority and PBDF concerning PBDF's financials which is otherwise disclosed.

24. Report 938/21 was prepared for the purpose of providing legal advice and factual information to the Board so that the Board could provide instructions to Gowling as to how to proceed in dealing with the defaults by PBDF. It incorporates Report 933/21 by reference and attaches an e-mail from Gowling answering legal questions posed by the Authority based on Report 933/21.

25. While it refers to the proposal made by PBDF in August of 2021, Report 953/21 was prepared for the purpose of providing legal advice and factual information to the Board so that the Board could provide instructions to Gowling as to how to proceed in dealing with the defaults by PBDF. It incorporates by reference and has attached to it Reports 933/21 and 938/21 and is inextricably linked to those Reports. Also attached to Report 953/21 is: (a) the proposal made by PBDF in August of 2021, which is otherwise disclosed; and (b) a memo to file dated 13 May 2021 that describes a meeting between PBDF and the Authority, which is otherwise disclosed.

26. Reports 933/21 and 938/21 do not directly address approvals and authorizations regarding the requests made and responses given with respect to concessions to be provided or given under s. 18.07 of the Lease, but were part of the factual matrix available to the Board when considering these issues.

27. Disclosure of Reports 933/21 and 938/21 is not necessary for PBDF to make inquiries of witnesses as to the information that was provided and considered by the Board when it considered

approving or authorizing requests made and responses given with respect to concessions to be provided or given under s. 18.07 of the Lease.

28. Mr. Clutterbuck, in response to undertakings, has, for example, identified the reports and briefs were considered by the Board that “led to” offers made by the Authority to PBDF. The same questions could have been asked in terms of the rejection by the Authority of offers made by PBDF, they were not. The Authority could have also inquired of Mr. Rienas what information was available to the Authority’s Board when it rejected offers made by PBDF, but PBDF chose not to cross-examine Mr. Rienas.

29. As noted above, Report 953/21 addresses the proposal made by PBDF in August of 2021. The fact that the proposal was put to the Board, but not accepted is not disputed. Disclosure of Report 953/21 is not necessary for PBDF to make inquiries of witnesses as to what documents and information was before the Board when it determined to reject PBDF’s proposal.

30. We a view to advancing the matter beyond the current impasse so that examinations can be completed by 30 June 2023, the Authority has indicated that it is prepared to produce redacted version of Reports 933/21, 938/21 and 953/21, provided that it is clear that in doing so the Authority is not waiving privilege. PBDF has rejected this offer, but has not provided any alternative—PBDF has taken an “all of nothing” approach, as opposed to a practical, approach to the (limited) disclosure directed by Your Honour.

List of Privileged Documents

31. PBDF did not request and Your Honour did not direct the parties to deliver Affidavits of Documents or even produce a list of documents over which privilege is being claimed. It is the Authority’s position that such a list would not be particularly helpful in the context of the issues that are to be determined at the hearing in July of 2023. The Authority notes that while PBDF has purported to prepare such a list, it is not particularly helpful in establishing that the listed documents are actually privileged.

32. Directing at this stage in the proceeding that the parties produce detailed lists of privileged documents will only lead to further litigation and delay for no practical purpose.

33. In *Dorchak v. Krupka* [1997 ABCA 89 (CanLII)] the Alberta Court of Appeal noted: “[t]he danger of giving away privileged secrets means that the description of the privileged documents need not include dates, contents, or parties to them” and “the description of the documents in the schedule need not corroborate privilege.”

Quality of Disclosure

34. The essential purpose of disclosure is to show what documents exists. [*Dorchak v. Krupka*, 1997 ABCA 89 (CanLII)]

35. PBDF has raised issues with the “quality” of the disclosure provided by the Authority in terms of how the documents disclosed by the Authority were provided and/or organized. The Authority has attempted to address each of PBDF’s concerns. When PBDF requested a detailed index, the Authority produced such an index in advance of the Rule 39.03 examinations. PBDF did not ask to delay the Rule 39.03 examinations to have more time with the Authority’s documents after receiving the detailed index.

4 May 2023

DELIVERED

E. Patrick Shea, LSM, CS Prof Corp
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David T. Ullmann and John C. Wolf
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Dear Sirs:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc.

On 5 April 2023, Her Honour directed that the parties disclose:

- (a) Documents exchanged between the parties and between their respective counsel, unless exchanged on a without prejudice/settlement basis:
 - (i) In the time frame in which the Lease was being negotiated (circa 2016) that relate to Art 18.07 of the Lease or its subject matter; and
 - (ii) In the time frame in which the boarder COVID-related restrictions came into effect and thereafter (March 2020-December 2021) with respect to the effect and implementation of Art 18.07 of the Lease.
- (b) Non-privileged internal documents relating to approval and authorization:
 - (i) Regarding Art 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016); and
 - (ii) Regarding the requests made and responses given with respect to concessions to be provided/given under Art 18.07 of the Lease from and after the border COVID-related restrictions came into effect (in the period from March 2020 to December 2021).

Attached please find the Authority's disclosure.

The bound volume includes all of the documents that were provided to us in 'hard' format. The USB includes communications identified based on searches conducted by our client of its e-mail system, some of which may be duplicated in the bound volume. To be more complete in terms of disclosure, we have included certain documents from 2015 and 2022.

We do not believe that we have either not included (or redacted) all communications that are subject to privilege, but any inadvertent disclosure of such communications should not be taken as

a waiver of privilege. We have treated as confidential the report comparing the various responses to the 2016 RFP. There are no references in that report to Art 18.07 or any rent adjustment clause.

We have attached the version of the draft Lease—V14 on 13 June 2016—in which Art 18.07 was first introduced. It is our understanding that this version was circulated by the Authority. We have not identified any subsequent mark-ups that proposed changed to Art 18.07.

Our client does not agree that all of the documents that the parties have been directed to disclose are necessarily admissible, but does not object to them all being before Her Honour.

Sincerely,

GOWLING WLG (CANADA) LLP



E. Patrick Shea, MStJ, LSM, CS

EPS:jm

Encl.

cc. Leanne Williams, lwilliams@tgf.ca (w/o attachments)

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08 June 2023

Sent by E-Mail (BJones@blaney.com)

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Dear Mr. Jones:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

Thank you for your letters of 1 and 4 June 2023, copies of which are attached for ease of reference.

Authority's Disclosure. On 4 April 2023, Her Honour directed that, by 5 May 2023, the parties provide what was described as limited disclosure. Her Honour directed the parties to disclose non-privileged internal documents relating to approval and authorization: (a) regarding Art 18.07 or its subject matters from the period in 2016 during which the Lease was being negotiated; and (b) regarding requests made and responses given with respect to concessions to be provided or given under Art 18.07 from March of 2020 to December of 2021.

In compliance with Her Honour's direction, the Authority's delivered its disclosure on 4 May 2023. That disclosure consisted of a "hard-copy" brief of documents and a USB containing e-mails. The transmission letter clearly identified what was on the USB and why it was being provided.

We heard nothing from you concerning the Authority's disclosure until your letter of 16 May 2023, a copy of which is attached for ease of reference.

At the attendance on 17 May 2023, Mr. Ullman described the issues raised in your letter of 16 May 2023 as "minor" in nature and did not indicate that those concerns would in any way impact the schedule set out in Her Honour's endorsement of 4 April 2023. Mr. Ullman did not raise any issue with the Authority's compliance with Her Honour's Endorsement of 4 April 2023 in terms of the Authority's disclosure

On 19 May 2023, you requested an index of the disclosure that we had provided to you on 4 May 2023.

On 25 May 2023, we e-mailed you a PDF of the Authority's disclosure, which, because of the addition of a large number of tabs, had to be broken into three (3) volumes, with a detailed index. Hard copies of the three (3) volumes were sent to you by overnight courier.

We subsequently sent to you a Word copy of the index of the hard-copy brief and the USB to assist you. We expressly identified that the Word included an index/listing of the e-mails on the USB in the order they are listed on the USB. Given how e-mails are saved, that is the best way to address them without PDF-ing and (re)naming them. The USB itself has an index that lists all of the files that are on the USB. We note, in passing, that PBDF's disclosure was provided as a "data dump" of individual documents that we had to organize to correspondent to an index that was provided as a stand-alone document.

Examinations. Notwithstanding Her Honour's endorsement of 4 April 2023 that Rule 39.03 examinations be scheduled early, you did not even begin to schedule examinations until 16 May 2023 and did not schedule your Rule 39.03 examinations to take place until 30 May 2023, which was after the deadline established by Her Honour.

You refused to conduct your Rule 39.03 examinations via Zoom and insisted on conducting the examinations in-person.

On 26 May 2023, you indicate that you were unable to locate a court reporter in Fort Erie for 30 May 2023 and indicated that the examinations would have to be re-scheduled. It was then left to the Authority to reach out to court reporters in the area around Fort Erie to locate a court reporter and we ultimately located a court reporter in St Catharines who was available on 30 May 2023.

You conducted the Rule 39.03 examinations on 30 May 2023. On 2 June 2023, before waiting to receive the responses to their undertakings and refusals, you unilaterally determined to cancel the cross-examination of Mr. Mills that was scheduled to take place 5 May 2023, the cross-examination of Mr. Rienas that was scheduled to take place 6 June 2023, and the cross-examination of Mr. Pearce that was scheduled to take place on 7 June 2023 based on the assertion that our disclosure was not complete or in accordance with Her Honour's direction of 4 April 2023. You did not, however, seek an attendance before Her Honour to address your concerns.

We advised you that, in our view, your position that the scheduled cross-examinations could not take place until you had completed your Rule 39.03 examinations was not legally correct and we were entitled to proceed to collect evidence by way of cross-examination of Messrs Mills and Pearce even if you did not wish to cross-examine Mr. Rienas. You confirmed that, notwithstanding that we indicated our clear intention to proceed with the cross-examinations scheduled for 5 and 7 June 2023, PBDF was not going to produce and either Mr. Mills or Mr. Pearce to be cross-examined on their affidavits

We attended on 5 June 2023 to examine Mr. Mills and on 7 June 2023 to examine Mr. Pearce. Neither Mr. Mills nor Mr. Pearce attended to be examined and Certificates of Non-attendance were obtained—a first for me in the context of case-managed litigation on the Commercial List.

Refusing to conduct cross-examinations and not producing affiants for cross-examination is not, in our view, appropriate in the context of a process where limited disclosure was directed by a Commercial List Judge who is case managing a litigation.

With respect to your assertion that Rule 39.02(1) somehow prevented the Authority from cross-examining Messrs Mills and Pearce as scheduled, we would note: (a) the Authority elected to not conduct examinations under Rule 39.03(3) such that Rule 39.02(1) did not present a barrier to the cross-examination of Messrs Mills and Pearce; (b) Rule 39.02(1) does not apply to the Authority's exercise of rights under 39.03(2) on your Rule 39.03 examinations; and, if there are any issues, (c) Her Honour has jurisdiction under Rule 39.02(2) to permit any required Rule 39.03 examinations to be conducted.

Authority Disclosure. You have identified two (2) broad issues with the Authority's disclosure: (a) failure to provide copies of Report over which privilege is being claimed; and (b) failure to produce a list of privilege communications.

With respect to the Reports over which the Authority asserts privilege, that issue should not have resulted in PBDF cancelling the cross-examination of Mr. Rienas or failing to produce Messrs Mills and Pearce to be cross-examined. The fact that the Authority asserts privilege over certain Reports from 2021 did not prevent you from making inquiries as to what the Board considered in connection with requests made and responses given with respect to concessions to be provided or given under Art 18.07.

There are three (3) Reports over which the Authority asserts solicitor-client and/or litigation privilege: 933/21 (30 April 2021), 938/21 (28 May 2021) and 953/21 (2 September 2021).

The Reports in issue were prepared in the context of contemplated litigation with PBDF over the breach of the Lease by PBDF. All of the Reports are marked "Confidential" and were provided to the Directors to convey legal advice and factual information to permit them to provide instructions to the Authority's lawyers:

Report 933/21 refers to advice sought and received from Gowling with respect to the issues between the Authority and PBDF. An e-mail chain between Gowling to Mr. Rienas is attached to the Report in which legal advice is provided to the Authority.

Report 938/21 incorporates Report 933/21 by reference and attaches responses from Gowling to legal questions asked by the Board.

Report 953/21 incorporates and attaches Reports 933/21 and 938/21, and refers to legal advice provided by Gowling.

Unless there is agreement, the issue as to whether Reports 933/21, 938/21 and Report 953/21 must be disclosed, in whole or in part, will need to be determined by Her Honour. We propose to deliver the Reports to Her Honour only for the purposes of the attendance on 14 June 2023 so that Her Honour will be in a position to determine whether the documents should be disclosed. However, to resolve the matter, the Authority is prepared to produce Reports 933/21, 938/21 and 953/21 redacted to remove all references to legal advice, provided PBDF agrees that this does not

constitute a waiver of privilege. This will permit cross-examinations to be completed by 30 June 2023.

We addressed certain of the specific disclosure-related concerns raised in your letter of 1 June 2023 in our letter of 2 June 2023, a copy of which are attached for ease of reference. We note:

1. You have not identified any specific documents that are in the brief that was delivered on 4 May 2023, but not the indexed brief that was delivered on 25 May 2023.
2. With respect to the assertions that the Authority has not provided disclosure of all of the documents upon which the Board relied in making determinations with respect to the concessions to be provided to PBDF, you will note from the responses by Mr. Clutterbuck to the undertakings that he gave on 30 May 2023 that, with the exception of those Reports over which the Authority claims privilege, all of the reports and briefing notes that “led to” relief offers from the Authority have, in fact, been produced.

Any speculation on your part that there may have been undisclosed documents considered by the Board: (a) regarding Art 18.07 or its subject matters from the period in 2016 during which the Lease was being negotiated; or (b) regarding requests made and responses given with respect to concessions to be provided or given under Art 18.07 from March of 2020 to December of 2021 appears, based on Mr. Clutterbuck’s evidence, to be without merit. While we appreciate that you may believe that there must have been other documents before the Board, the fact of the matter is that there were not and the Authority may make of that what you wish in argument at the hearing in July of 2023.

3. With respect to the e-mail on 19 November 2020 on 30 May 2023, you asked Ms Costa for an undertaking to produce Report 909/20 referred to in that e-mail. Report 909/20 is, in our view, outside of the scope of the disclosure directed by Her Honour. You will, however, find it attached to the responses to Ms Costa’s undertaking so you can see for yourself that it does not relate in any way to approvals or authorizations regarding requests made and responses given with respect to concessions to be provided or given under Art 18.07. Report 909/20 relates only to internal Authority financial matters.
4. With respect to the Minutes from 20 November and 17 December 2023, the Authority claims privilege over those Minutes because the resolutions reflected in those Minutes were made based on legal advice, although the Authority’s lawyers were not present at those meetings. They have, however, now been provided in response to the undertakings given by Mr. Clutterbuck on the express understanding that in doing so no privilege is being waived. We note that Mr. Clutterbuck answer your questions and answered undertakings given in

connection with the issues that were the subject of the resolutions reflected in those Minutes.

5. With respect to the assertion that information redacted from Reports that have been produced is relevant to the issue of whether the Authority may have given “preferential treatment” to the US duty free, none of the information relating to the US duty free that you assert should have been disclosed relates to approvals and authorizations: (a) regarding Art 18.07 or its subject matters from the period in 2016 during which the Lease was being negotiated; or (b) regarding requests made and responses given with respect to concessions to be provided or given under Art 18.07 from March of 2020 to December of 2021. We propose to deliver the unredacted Reports to Her Honour only for the purposes of the attendance on 14 June 2023 so that Her Honour will be in a position to determine whether the Reports should be disclosed unredacted.

With respect to specifically-identifying all of the Authority’s privileged documents, we appreciate that you were not in attendance before Her Honour, but this is not something that PBDF requested before Her Honour on 4 April 2023 or 17 May 2023 and it is not something that the Authority was, in the circumstances, prepared to do as a condition of PBDF producing Messrs Mills and Pearce to be cross-examined.

Should Her Honour direct that the parties produce such lists, your list will have to be corrected because it is unclear in a number of instances why privilege is being asserted over the document as there is no indication on your list that the communication is with a lawyer and not copied to any third party(ies) or the notes were prepared by a lawyer.

PBDF’s Disclosure. We have concerns with respect to whether PBDF’s own disclosure is complete. It seems strange, for example, that there are so few internal PBDF documents: (a) regarding Art 18.07 or its subject matters from the period in 2016 during which the Lease was being negotiated; and (b) regarding requests made and responses given with respect to concessions to be provided or given under Art 18.07 from March of 2020 to December of 2021. There appear to be only three (3) pieces of (relevant) internal correspondence disclosed and no PBDF board minutes or resolutions.

In our view the proper way to address those issues was to ask questions of Mr. Pearce with respect to the disclosure provided so that any issues could be addressed at the attendance before Her Honour on 14 June 2023 based the issues having been “flushed out”. PBDF’s refusal to produce Mr. Pearce for cross-examination has deprived the Authority with the opportunity to make inquiries to determine if there are additional documents that may not (yet) have been disclosed by PBDF.

Conclusion. In conclusion, we fail to see how your approach—demanding that the Authority prepare a list of privileged communications and produce Reports over which it has legitimate concerns with respect to privilege as conditions of conducting examinations and cross-

examinations in accordance with a scheduling order—is productive or co-operative. There is, in our view, no conceivable link between the cross-examination of Messrs Mills and Pearce on the Affidavits that they have sworn in these proceedings and the Reports prepared for the Authority's Board, and the cross-examination of Mr. Rienas may have provided some light on the disclosure-related issues that you raised.

Sincerely,

GOWLING WLG (CANADA) LLP



E. Patrick Shea, MStJ, LSM, CS

EPS:jm

Enclosure

cc. Christopher Stanek

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May 16th, 2023

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Suite 1600
Toronto, ON, M5X 1G5

Dear Mr. Shea:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing with respect to the examinations to be completed in the coming weeks and the recent disclosure in accordance with Justice Kimmel's April 4th, 2023 endorsement.

Rule 39.03 examinations and cross-examinations of affiants

We intend to examine Karen Costa and Tim Clutterbuck pursuant to Rule 39.03. We also intend to examine Ron Rienas on his various affidavits.

We are available on May 19th, 26th for the Rule 39.03 examinations. Alternatively, we can schedule the Rule 39.03 examinations to take place before the cross-examinations of the affiants to take place during the week of May 29th to June 2nd. We can accommodate examinations any day that week.

Document briefs

You requested our position regarding the use of the document briefs for the motion before Justice Kimmel on July 25th to 27th, 2023.

As a practical matter, the Authority has not produced a list of documents that it disclosed. It produced a hard copy disclosure brief, which only separates the documents by year, and a separate "email dump" on a USB key. These emails are not organized and are not identified in a list or index. The Authority also has not identified any of the documents it is claiming privilege over.

The Authority's disclosure in its current state is not useful to consider admitting as evidence at the hearing. Please confirm that an organized brief with a list of the documents will be provided.

With respect to the content of the disclosure, the only Board Reports and Board Minutes are from 2016. The Authority has not disclosed any reports or minutes after the border restrictions came into effect. Is it the Authority's position that no such records exist?

We also ask that you kindly clarify what use you propose be made of the document brief(s). Specifically:

1. Are the documents to be admitted as authentic true copies of the originals?
2. Are all correspondence and other documents to be admitted as having been prepared, sent and received on or about the dates set out in the documents, unless demonstrated otherwise?
3. Is the content of any particular document to be admitted for the truth of its contents?
4. Are there any documents to be treated as exceptions to the general agreement on the treatment of the documents in the document book?
5. Does the Authority object to any of the documents in either of the briefs being relied upon?
6. Can Justice Kimmel rely on any documents in the document brief that have not specifically been referred to or relied upon by the parties?

Request for response

We look forward to hearing from you regarding scheduling the examinations as set out above.

We also request a response with respect to the issues relating to the document briefs well in advance of the examinations.

We would be pleased to discuss these matters with you.

Yours very truly,

BLANEY MCMURTRY LLP



Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

Brendan Jones
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BJones@blaney.com

June 1st, 2023

Via Email

Patrick Shea and Christopher Stanek
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
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Toronto, ON, M5X 1G5

Dear Counsel:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing further to the examinations of Mr. Clutterbuck and Ms. Costa on Tuesday May 30th, 2023 and the Authority's Disclosure Brief delivered in hard copy on Friday May 26th, 2023.

The Authority has not to date complied with Justice Kimmel's April 4th, 2023 Endorsement regarding production of its internal documents.

Specifically, paragraph 17.b. of Justice Kimmel's Endorsement requires:

b. Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:

i. Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and

ii. Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).

Despite the evidence given by Mr. Clutterbuck that:

1. Any lease amendment or rent relief in the form of a deferral or abatement would require direction from the board of directors;
2. The board of directors would give direction to staff by way of resolution given at its meetings;

3. The board meetings are scheduled on a monthly basis;
4. The board of directors would rely on briefing notes, reports or summaries to give directions;
5. Resolutions would be recorded in the minutes of board meetings;
6. Agendas would be circulated before board meetings; and
7. Board meetings held virtually were recorded so far as he understood it.

The Authority produced one (redacted) report from the post-Covid period, which is dated April 24th, 2020 that relates to the first rent deferral agreement.

As an example of the Authority improperly withholding records, an email from Mr. Rienas to the board (Tab C25) indicated that the second rent deferral agreement would be discussed at the November 20th, 2020 meeting. Those minutes along with the report considered at the meeting have not been disclosed.

Similarly, the December 17th, 2020 meeting minutes and reports relied upon have not been produced despite a December 17th, 2020 email from Mr. Rienas (Exhibit 1 of Ms. Costa's examination) that indicates the deferred rent was discussed and direction was given to staff by way of resolution that was "subject to legal approval", which implies that the Authority's lawyers were not at the meeting.

The November 20th and December 17th, 2020 meetings are critical meetings because the Authority somehow went from receiving a recommendation to defer all rent payments until at least March 31st, 2021 to demanding immediate payment of \$1 million and refusing to defer any rent.

In any event, the Authority cannot withhold production of the entire meeting minutes or reports relied upon based on solicitor-client privilege without any explanation.

With respect to redactions made, for example in the reports at Tab F and elsewhere in the Disclosure Brief, it is apparent that information was redacted from documents that are otherwise relevant and go directly to issues raised in the notice of motion (including that the Authority gave preferential treatment to its other duty-free store tenant).

There were also a number of emails that were identified as being relevant and produced in the first disclosure brief, that were subsequently not included in the second disclosure brief (possibly because they are unhelpful to the Authority's position) without any explanation and without identifying what was removed.

Please provide a list of all documents (noting subject matter, date, to and from) for which privilege is claimed as well as the basis for privilege.

By failing to comply with Justice Kimmel's Endorsement, the Authority has prevented our client from being able to ask Ms. Costa and Mr. Clutterbuck about key records that have been withheld. You will recall that to streamline the litigation, Justice Kimmel's April 4th, 2023 Endorsement required production of documents *in advance* of the Rule 39.03 examinations.

Instead, the Authority caused a significant number of undertakings to produce documents that should have been available before the examinations; and which will likely result in a bifurcation of examinations.

As you are aware, under Rule 39.02(2), the Rule 39.03 examinations must be completed before the cross-examinations on affidavits.

The Authority must disclose all of its records prior to completion of the Rule 39.03 examinations. Once we receive full production of documents and information about claims of solicitor-client privilege, we will advise regarding scheduling the continuation of the examinations of Ms. Costa and Mr. Clutterbuck arising from the documents the Authority failed to produce.

We ask that you produce the Authority's documents as a supplementary brief of indexed documents with a schedule of privileged documents included as soon as possible.

Should you wish to discuss these matters, please contact us.

Yours very truly,

BLANEY MCMURTRY LLP

A handwritten signature in black ink, appearing to read "Brendan Jones", written over the printed name.

Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

02 June 2023

Sent by E-Mail (BJones@blaney.com)

E. Patrick Shea, LSM, CS Prof Corp
Direct 416-369-7399
patrick.shea@gowlingwlg.com

Brendan Jones
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5

Dear Mr.Jones:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

Thank you for your letter of 1 June 2023.

We believe that we have complied with Her Honour's direction in terms of productions and we will address the undertakings given during the Rule 39.03 examinations of Mr. Clutterbuck and Ms. Costa.

Any issues, including whether witnesses are required to re-attend, can be addressed before Her Honour at the next attendance on 14 June 2023 and there is no basis for there to be any delay in completing the scheduled cross-examinations. Rule 39.02 contemplates that the Court may permit the continuation of your Rule 39.03 examinations of Mr. Clutterbuck and Ms Costa notwithstanding that you have cross-examined Mr. Pearce. The cross-examination of Mr. Pearce may, in fact, assist you in determining whether there is actual substantive merit to the issues raised in your letter and a need to conduct further Rule 39.03 examinations of Mr. Clutterbuck and Ms. Costa.

Without engaging a debate or argument as to the merits of your assertions, we wish to clarify certain of the assertions made in your letter:

1. The Authority has produced two—not one—reports to the Board during the post-COVID period in which the arrangements with PBDF were referenced. The e-mail at J1 is the report that was produced for the purposes of the Board meeting on 20 November 2020.
2. With respect to the 17 December 2020 Board meeting, there was no report prepared for the purposes of that meeting.
3. The explanation for claiming privilege over Board-related materials is straight-forward—lawyers were in attendance at the meeting, legal advice was discussed at the meeting or the report prepared for the purposes of the meeting provides or summarizes legal advice. Provided you agree that by producing them no privilege is being waived, the Authority would be pleased to produce the Minutes from the 20 November 2020 and 17 December 2020 meetings today.

4. With respect to the Board's conditional approval of the Second Rent Deferral, you requested from Mr. Clutterbuck an undertaking to provide an explanation and one will be provided. We suspect that you will also cross-examine Mr. Rienas on that issue.
5. Can you please identify which e-mail(s)—the date, who the e-mail was from and to whom it was sent—that you assert were included in the first printed disclosure brief, but not in the second? You were provided with all of the documents in both briefs as well as a USB containing the documents that were not provided to us in "hard" copy. The only difference between the first and second in terms of what was included was to be the inclusion of a detailed index as requested by you and tabs. If there were documents that were left out of the second brief, it was unintentional—the fact that you purport to have identified that e-mails are missing from the second brief clearly means that there has been no prejudice.
6. We will not be providing you with a list of privileged documents. PBDF did not request, and Her Honour did not order, that Affidavits of Documents be produced and PBDF did not request, and Her Honour did not require, that either side deliver a list of privileged documents.

We would, of course, be pleased to discuss the foregoing in advance of your cross-examination of Mr. Pearce on 6 June 2023.

Sincerely,

GOWLING WLG (CANADA) LLP



E. Patrick Shea, MStJ, LSM, CS

EPS:jm

cc. Chris Stanek

57041683\1

Brendan Jones
D: 416-593-2997 F: 416-594-3593
BJones@blaney.com

June 4th, 2023

Via Email

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1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Counsel:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing in response to Mr. Shea's letter dated June 2nd, 2023, which followed Blaney's letter following the commencement of Rule 39.03 examinations.

Continuation of Adjourned Rule 39.03 Examinations

The Rule 39.03 examinations are presently adjourned and incomplete as there are a large number of outstanding undertakings to produce undisclosed relevant documentation.

Without the receipt of proper responses to undertakings PBDF is unable to determine whether a continued examination of Mr. Clutterbuck and/or Ms. Costa is required; although it is PBDF's current belief that further examinations will be required.

We assume that in such an event Mr. Stanek will wish to continue his own Rule 39.03 examinations of the witnesses, meaning the Authorities examinations are also incomplete.

Cross Examinations Begin After Rule 39.03 Examinations Are Complete

Further, and perhaps more importantly, by reason of Rule 39.02(1) and (2) all Rule 39.03 examinations must be completed, including delivery of responses to undertakings, before cross-examinations on the affidavits can begin. The information and documents that are produced by way of undertakings in the Rule 39.03 examinations will thus be available for the cross-examinations. This cannot be resolved by the parties agreeing to continue the Rule 39.03 examinations after the cross-examinations are completed.

Had the Authority produced the records at first instance in accordance with Justice Kimmel's endorsement this situation would likely have been avoided.

It is inappropriate for PBDF to be deprived from having a complete record of documents and evidence of the Rule 39.03 witnesses available for the cross-examination of Mr. Rienas.

The examinations scheduled for June 5th to 7th, 2023 will need to be rescheduled until the Rule 39.03 production issues are rectified and those examinations are complete.

Other Relevant Factors Impacting Examinations and Cross Examinations

While we anticipate based upon past practice that the Authority's initial reaction may well be to object to a short postponement of the cross-examinations until the Rule 39.03 examinations are complete, please consider the following:

- The Authority's initial disclosure brief did not identify any individual documents. Instead it was a hard copy brief separated (mostly) by year and a USB key "email dump" of unindexed and unorganized emails. The absence of the courtesy of ordinary documentary organization, made examinations more difficult and time consuming.
- The Authority did not identify any documents that it was claiming privilege over in its initial disclosure brief. At the end of the day on Thursday May 24th, 2023, the Authority sent a three-volume disclosure brief in PDF by email. The index only identified four emails from the USB key. The index disclosed for the first time that the Authority was claiming wholesale privilege over certain meeting minutes and reports relied upon by the Authority in respect of its rent relief considerations under subsection 18.07 of the Lease.
- The following day, the Friday before the Tuesday Rule 39.03 examinations, the Authority delivered hard copies of the three volume disclosure brief. Again, the index only identified four emails from the USB key, the same as the PDF version.
- Contemporaneously the Authority sent an email attaching a word document index to only one of the PBDF's lawyers. The covering email did not advise the word document index was different than the PDF version or the hard copy version that were sent and it appeared to be the same index as provided in PDF and hard copy. *We have now learned that the word version contained ten additional pages of index listing the emails from the USB key, although we have not been able to confirm whether the word document list corresponds with the USB "email dump".*
- It was never disclosed to us, nor to date has it been explained why the USB emails were not included and produced in the second disclosure brief either in PDF form or hard copy or organized chronologically as the other emails were.
- Ordinary disclosure practice in litigation, would result in counsel believing the different manners of delivering documents (email/hardcopy/USB) included *the same documents*- and not a "find the difference if you can" approach to identify the USB documents that were omitted from the word and hard copy documents provided. This is especially so when the Authority elected to not engage in the courtesy of noting to PBDF that a difference existed.
- Whether intentional or not, the Authority's actions caused PBDF to be misled about the Authority's productions.
- In its second disclosure productions, the Authority improperly asserted complete privilege over the entirety of various reports and meeting minutes. In effect the Authority has withheld any disclosure about who authored the reports and minutes, who received them, the purpose of the creation of any such documents. The Authority has not identified who was at the meetings for which it has claimed privileged over the minutes in their totality. Obviously, parts of each such document are not privileged and they should have been delivered in advance of Rule 39.03 examinations with redactions as necessary.
- With respect to item #1 in your June 2nd, 2023 letter, the email at tab J1 indicates that Ms. Costa was going to be discussing Report 909/20 with the Board in the context of "potential collectability issues" relating to PBDF's lease. At that meeting, the Board elected not to execute the second rent relief agreement despite Mr. Rienas' recommendation to do so.
- With respect to item #6 in your June 2nd, 2023 letter, the assertion that the Authority has no obligation to disclose what documents it elected to assert a claim of privilege over that would have otherwise been producible pursuant to Justice Kimmel's April 4th, 2023 Endorsement is extremely

problematic. Without disclosure, there is no way to test whether the privilege is appropriate or to even know that a privilege has been asserted.

Whether or not the Authority agrees with the position set out above, we trust that you understand that the examinations scheduled for June 5th to 7th, 2023 must be adjourned until the Rule 39.03 examinations are completed. While this is not ideal, and Blaney would have preferred to proceed as scheduled, the delay is entirely outside of Blaney's control.

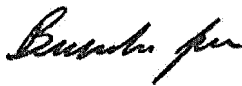
We also note the Authority effectively is in control of the amount of delay by the timing of production of undertakings, and ideally its reconsidering of the demand to itemize privileged documents. We also note there is no prejudice to the Authority from any short delay as it is currently receiving full rent.

PBDF is hopeful that the parties can move past the current status quo in a co-operative manner such that a full and complete record is available. In this regard the PBDF is at a loss as to understand why the Authority has refused to date to make appropriate disclosure as to its documentations for which a claim of privilege is asserted.

If the Authority disagrees about the scope of production requested, we suggest a case conference be convened with Justice Kimmel to address these matters.

Yours very truly,

BLANEY MCMURTRY LLP

A handwritten signature in black ink, appearing to read "Brendan Jones", written in a cursive style.

Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

UNDERTAKINGS AND REFUSALS
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Lawyers for Buffalo and Fort Erie Public Bridge Authority

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

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